

13026

CCM
ms. Yudenberg



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-164031(3).154

DATE: March 4, 1980

MATTER OF: Medicaid-Utilization Control

DIGEST: Department of Health, Education, and Welfare (HEW) is required to reduce Medicaid payments to State under section 1903(g) of Social Security Act, 42 U.S.C. 1396b(g) as amended, unless State makes satisfactory and valid showing that it has program of control over utilization of long term institutional services. In order to make valid showing, State must comply with criteria listed in statute including physician certification of need and plan for care in case of each long term patient. Fact that State may have satisfied most of requirements of statute does not permit HEW to find showing valid where any long term patients are found not to have certification of need or plan of care.

ACC 22

This decision is in response to a request from the former Secretary of the Department of Health, Education, and Welfare (HEW) for our opinion concerning the Secretary's ~~authority with respect to the reduction of Medicaid payments~~ made to the States of Hawaii, Tennessee, Colorado and Missouri. The Secretary had determined that the payments must be reduced as a result of the failure of these States to satisfy, for the quarter ending March 31, 1978, the utilization control provisions of the Medicaid program set forth in section 1903(g) of the Social Security Act, as amended, 42 U.S.C. § 1396b(g) (1976 and Supp. I, 1977). Because these States have satisfied the requirements with respect to all but a few recipients of long term medical assistance, HEW feels that a full reduction in payments in accordance with the statutory formula is "too harsh in light of the limited defects found." If this situation should occur again, HEW would like to know if it is authorized to find that a State has satisfied the utilization control provision of the act if the State has met the requirements in all except one or two instances. For the reasons stated below, there is no authority for the Secretary of HEW to make a finding of compliance under these circumstances.

Section 1903(g) of the Social Security Act requires HEW to reduce a State's Federal Medicaid payment unless the State has made a showing satisfactory to the Secretary of HEW that it had an adequate program of control over the utilization of institutional long term care for the

to Certain States] ~~008846~~ 111708

quarter reported. According to section 1903(g)(1) of the Act, the State's showing must include evidence that:

"(A) in each case for which payment is made under the State plan, a physician certifies at the time of admission, or, if later, the time the individual applies for medical assistance under the State plan (and re-certifies, where such services are furnished over a period of time, in such cases, at least every 60 days, and accompanied by such supporting material, appropriate to the case involved, as may be provided in regulations of the Secretary), that such services are or were required to be given on an inpatient basis because the individual needs or needed such services; and

"(B) in each such case, such services were furnished under a plan established and periodically reviewed and evaluated by a physician;

"(C) such State has in effect a continuous program of review of utilization pursuant to section 1396(a)(30) of this title whereby each admission is reviewed or screened in accordance with criteria established by medical and other professional personnel who are not themselves directly responsible for the care of the patient involved, and who do not have a significant financial interest in any such institution, and are not, except in the case of a hospital, employed by the institution providing the care involved; and the information developed from such review or screening, along with the data obtained from prior reviews of the necessity for admission and continued stay of patients by such professional personnel, shall be used as the basis for establishing the size and composition of the sample of admissions to be subject to review and evaluation by such personnel, and any such sample may be of any size up to 100 per centum of all admissions and must be of sufficient size to serve the purpose of (i) identifying the patterns of care being provided and the changes occurring over time in such patterns so that the need for modification may be ascertained, and (ii) subjecting admissions to early or more extensive review where information indicates that such consideration is warranted; * * *" (Emphasis added)

These criteria are required to be met by a State in order for it to make a satisfactory showing to the Secretary of HEW. B-164031(3).118, July 3, 1975. If, in the course of HEW's validation survey, it is

determined that despite a certification by a State to the contrary, the requirements of section 1903(g) have not been met "in each case," the Secretary of HEW has no alternative but to classify the State's showing as invalid.

In his letter to us, the former Secretary of HEW described the recent validation survey. He wrote:

"The Department recently conducted a validation survey for the quarter ending March 31, 1978 in intermediate care facilities in selected states. The survey was intended to determine whether these states met the provisions of section 1903(g)(1) (A) and (B), which require timely physician certification of the need for institutional care and the development of a plan of care in each long stay case for which Medicaid payment is made. One state in each region was surveyed. Department surveyors examined the medical records of 20 randomly chosen recipients admitted or authorized to receive payment during the quarter in each of the twenty facilities in the state having the greatest number of beds certified for Medicaid. As a result of this survey, I have determined that four states failed to make valid showings that there was in operation an effective program for controlling utilization of services in intermediate care facilities for the quarter, as required by section 1903(g). The states are Hawaii, Tennessee, Colorado, and Missouri. These states have been notified of our intent to assess reductions in FMAP in accordance with section 1903(g)(5).

"In each of these states, the Department's determination that the showing was invalid was based upon a survey finding that the requirements contained in section 1903(g)(1) (A) and (B) were not met with respect to only a few recipients in the state. In Hawaii, the medical records of all Medicaid recipients admitted or authorized to receive payment during the quarter were reviewed (104 recipients in 14 facilities). In Tennessee, surveyors examined 315 patient records in 20 facilities. Surveyors found that the requirements were not met with respect to one recipient in one facility in each state. In Missouri, 228 records in 20 facilities were reviewed, and the requirements were not met with respect to a single patient in each of two facilities in the state. In Colorado, 180 records were surveyed, and deficiencies were found in one patient record in each of three facilities. These findings, however, resulted in substantial reductions in the Federal medical assistance percentages. In the case of Hawaii, a penalty of \$47,107 was assessed; in Tennessee, \$34,731; in Missouri, \$40,354; and in Colorado \$21,377."

The reasonableness of the utilization control standards and reduction formula were the subject of section 20 of the Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. No. 45-142, 91 Stat. 1205, Oct. 25, 1977. In revising the utilization control requirements, Congress was aware that the utilization control standards it had established covered every long term patient. The House Ways and Means Committee, H. Rep. 95-393, Part II, at 84, outlined the utilization review requirements as follows:

"The program must include a showing that:

"(1) The physician certifies at the time of admission and recertifies every 60 days that the patient requires inpatient institutional services.

"(2) The services are furnished under a plan established and periodically reviewed by a physician.

"(3) The State has a continuous program of utilization review whereby the necessity for admission and continued stay of patients is reviewed by personnel not directly responsible for care of the patient, not financially interested in a similar institution, or, except in the case of a hospital, employed in the institution.

"(4) The State has a program of independent medical review for SNF's, ICF's, and mental hospitals whereby the professional management of each case is subject to independent annual review." (Emphasis added.)

Furthermore, based on representations from HEW that it was without discretion in the area, Congress attempted in section 20 to provide legislation to describe the circumstances where and the extent to which HEW is to impose reductions for State failure to make a satisfactory or valid showing. The Committee report says:

"In the light of the Secretary's position that HEW has no discretion in determining that the requirements of the law have been met, the Committee has provided a standard of reasonableness in the bill. Id. at 85.

The standard of reasonableness that addresses the problem of less than 100 percent patient coverage by the State's utilization control program, however, changed only the requirement for independent medical review of all patients. This was done in order to allow some exceptions where medical review teams were unable to visit all facilities during a year. As a result section 20 added section 1903(g)(4)(B) which provides:

"(B) The Secretary shall find a showing of a State, with respect to a calendar quarter under paragraph (1), to be

satisfactory under such paragraph with respect to the requirement that the State conduct annual on-site inspections in mental hospitals, skilled nursing facilities, and intermediate care facilities under paragraph (26) and (31) of section 1396a(a) of this title, if the showing demonstrates that the State has conducted such an onsite inspection during the 12-month period ending on the last date of the calendar quarter--

"(i) in each of not less than 98 per centum of the number of such hospitals and facilities requiring such inspection, and

"(ii) in every such hospital or facility which has 200 or more beds,

and that, with respect to such hospitals and facilities not inspected within such period, the State has exercised good faith and due diligence in attempting to conduct such inspection, or if the State demonstrates to the satisfaction of the Secretary that it would have made such a showing but for failings of a technical nature only."

There is no indication in the legislative history that the Congress had any intention of reducing the standard for facilities visited by medical review teams. Indeed, given the closely circumscribed standards for relief outlined in section 1903(g)(4)(B), it may be inferred that Congress intended to leave the rest of the statutory standard intact. Otherwise, it would have outlined as carefully the nature and extent of discretion it intended for HEW.

The Congress did establish, in section 1903(g)(5), a modified reduction formula to lessen the impact where States had achieved substantial but incomplete compliance. HEW has applied this formula for the States described in the submission. Based on the information contained in the submission, HEW has applied the correct standard for testing utilization review compliance and applied the reduction formula as required. The fact that a State's non-compliance with these requirements might be minimal does not alter this standard.

Thus, for the foregoing reasons the Secretary of HEW does not have authority under the circumstances presented to find that a State has satisfied the Medicaid utilization control provisions.



For The Comptroller General
of the United States